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IN THE

Supreme Court of the United States

October Term, 1962.

No. 354.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE JUDGES THEREOF,

Petitioners,

v.

TIMOTHY J. MAHONEY, ESQUIRE, and His Partners, Trading as KRUSEN EVANS AND BYRNE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 354

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND THE JUDGES THEREOF,

Petitioners

v.

TIMOTHY J. MAHONEY, ESQUIRE, AND HIS PARTNERS, TRADING AS KRUSEN EVANS AND BYRNE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The petitioners seek to invoke 28 U. S. C. A. § 1254(1) as the basis for the jurisdiction of this Court to review the judgment of the Court of Appeals for the Third Circuit. That section provides that cases may be reviewed by this Court upon writ of certiorari granted upon the petition of *any party* to any civil or criminal case.

We respectfully suggest that the petitioners are not such parties as may seek review of the decision below. The petitioners here were not parties in any sense of the word

until after the decision of the Court of Appeals. After that decision they petitioned for leave to intervene as parties-appellees and leave was granted by the Court of Appeals August 4, 1962 [see petition, 37a, and order, 42a].[1]

The jurisdictional question will be discussed in our argument under the heading of "Reasons Why the Writ Should Not Be Granted".

QUESTIONS PRESENTED.

I. May judges of a district court, by intervening after decision and judgment of the court of appeals reversing a judgment of the district court, obtain an advisory opinion from this Court?

II. Is there a "case or controversy" between petitioners and respondents?

III. Does a district court, by promulgating "standing orders", have the right to initiate procedures which are inconsistent with the Federal Rules of Civil Procedure, specifically Rules 16, 41 and Rules 26 through 35?

IV. Has a district court of the United States the power to assess summarily a fine against an attorney who, entirely through inadvertence, did not timely file a pretrial conference memorandum, which memorandum was, however, filed when the omission was detected?

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1. In referring to the record we will use the suffix "a" following page references to the various appendices printed and bound with the petition. We will use the suffix "b" to refer to such portions of the record as are printed and bound with this brief in opposition.

STATEMENT OF THE CASE.

Pursuant to a standing order with respect to the filing of pretrial conference memoranda, the plaintiff and the third-party defendant in an ordinary civil action to recover damages for personal injuries, filed the memoranda referred to in the order. Entirely through inadvertence, the date upon which the defendant's memorandum would have been due under the standing order was not entered upon the lawyer's diary [2] and the attorney for the defendant did not file the memorandum upon the date required. There was no activity in the case between the time of filing of the pretrial memorandum for the third-party defendant and the pretrial conference itself, although ten months and ten days elapsed [see docket entries, 2b]. When notice of the pretrial conference was received, the attorney entered *that* date in his diary. When he reviewed his file a few days in advance of the scheduled conference in order to prepare for it, he caught the omission. He promptly filed a full and complete memorandum, complying in every way with the so-called "standing order".

The chief subject matter of discussion at the pretrial conference was settlement. The court suggested an amount which it thought would be a proper settlement [7b]. Thereafter there was extensive correspondence between the court and all counsel looking toward settlement upon the basis suggested by the Court [8b to 23]. When those settlement discussions broke down the plaintiff filed a motion to strike the pretrial memorandum of the defendant because it had not been timely filed.

Under the practice in the district court the reason for such a motion is clear, although it is not stated anywhere in the rules or standing orders. As interpreted, only those witnesses named in the pretrial conference memorandum and those theories set forth therein may be presented at

2. A job delegated to a secretary.

trial.[3] If the plaintiff's motion to strike the pretrial memorandum had been granted, then under the practice in the district court [not defined by any rule or standing order] the defendant would not have been permitted to call any witnesses. See opinion, infra., 1a at 2a, where it is stated that the result would have been a judgment of default.

Five days after the pretrial conference was actually held the pretrial report was filed by the judge who had conducted the conference. Nothing appeared therein concerning a fine or other penalty by reason of the late filing [6b]. There was no indication at the pretrial report that the conference "was frustrated" [petition, 8a] or that the inadvertent delay in filing caused delay in the conference. Eighty-nine days elapsed between the time of the pretrial conference and the time of the argument upon the plaintiff's motion to strike the defendant's pretrial conference memorandum [see docket entries, 2b]. On the third day following the argument, the district judge entered an order which did three things. It struck the names of some witnesses listed in the pretrial conference memorandum of the defendant. All witnesses were not stricken because others had been identified earlier in answers to interrogatories. The court awarded to the attorney for the plaintiff costs, expenses and reasonable counsel fees caused by the delay in filing the memorandum.[4] Finally, the district court's order imposed a fine of $100.00 to be paid to the United States by "counsel for defendant". It is from this portion of the order that the controversy now before this Court has arisen.

As an appendix to this brief the respondents have printed the pretrial order and correspondence among court

3. Cf. *Payne v. The Nabob*, — F. Supp. —; 302 F. 2d 803; petition for certiorari pending, No. 420 Misc.

4. Plaintiff's counsel did not present an order for costs and counsel fees to the district judge for signature, apparently electing not to seek them, possibly for the reason that in other cases the shoe may fit the foot of plaintiff's counsel.

and counsel which followed the pretrial conference. The purpose of printing it is to demonstrate that the delay in filing the memorandum did not prejudice or frustrate—or indeed interfere in any way—with the pretrial conference itself. The record clearly demonstrates that if plaintiff's attorney had not sought to have the defendant's memorandum stricken, thus seeking to turn the pretrial conference and memorandum into an offensive weapon, nothing further would have eventuated. See the report of the pretrial conference judge, reproduced pages 6b and 7b.

From the court's order of February 23, 1961, imposing the fine and other sanctions, the respondents filed a notice of appeal as to the fine only, pursuant to the Federal Rules of Criminal Procedure [*Union Tool Company v. United States*, 259 U. S. 107, 110; *Nye v. United States*, 313 U. S. 33.]. The notice of appeal was caused to be served upon the United States Attorney [24b], but the United States, to which the fine had been ordered paid, did not appear or participate in the appeal before the court of appeals. Instead, apparently at the request of the judge involved, an amicus curiae was given leave and did participate by brief and oral argument before the court of appeals.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. There Is Not Jurisdiction Under 28 U. S. C. A. § 1254(1).

We have found no case where the judges of a court have been permitted to intervene and become parties-petitioners for certiorari in circumstances where an order of a judge of the court levying a fine payable to the United States has been reversed upon appeal. There is, we suggest, no "case or controversy" between petitioners and respondents, and the petitioners have no "independent right which is violated". *Boston Tow Boat Co. v. United States*, 321 U. S. 632 at 634.

The parties to the original civil litigation have no interest or concern in the present proceeding, for that controversy has long since been settled and discontinued. See docket entries, 5b. The United States is the only other possible "party", but, although served with notice of the appeal from the district court's order, it has not participated either before the court of appeals or this Court.

The nearest analogy we have found are two decisions by this Court. In the first, *Buck's Stove and Range Co. v. American Federation of Labor*, 219 U. S. 581, this Court dismissed the case as moot when, upon oral argument of a case involving a fine for civil contempt, it developed that the case in chief had been settled. In the collateral case of *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, the Court again said that "the present proceeding necessarily ended with the settlement of the main cause of which it is a part".

A complete discussion of the point would make this reply overly long. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, 1951 Ed., Chap. 38. Various aspects of the point are discussed in opinions of this Court in *Boston Tow Boat Co. v. United States*, 321 U. S. 632; *Liberty Warehouse Co. v. Grannis*,

273 U. S. 70; *United States v. California Co-operative Canneries*, 279 U. S. 553; *Aetna Life Insurance Co. v. Howarth*, 300 U. S. 227, and *Grant v. United States*, 227 U. S. 74. It is respectfully suggested that this is not a case or controversy; that the petition is intended to obtain an advisory opinion from this Court; and judged by ordinary standards jurisdiction is lacking.

II. There Is No Authority for the District Court's Order Assessing a Fine Against an Attorney in Private Civil Litigation Under the Facts in This Case.

It is conceded by petitioners that there is no statutory authority for the fine which the district court imposed. It is likewise conceded that Rule 42 of the Federal Rules of Criminal Procedure was not followed. There is a disclaimer of any intent to invoke criminal contempt. Such disclaimer is not conclusive. We are dealing with a fine assessed against an attorney for a party in private civil litigation, the fine to be paid to the United States. The genus of the thing with which we are dealing becomes clear.

> "As Mr. Justice Brandeis stated in Union Tool Co. v. Wilson, 259 U. S. 107, 110, 'where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.' The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor. The prayer for relief and the acts charged carry the criminal hallmark. Cf. Gompers v. Buck's Stove and Range Co., 221 U. S. at 449. They clearly do not reveal any purpose to punish for contempt "in the aid of the adjudication sought in the principal suit" ' ." *Nye v. United States*, 313 U. S. 33 at 42, 43.

The petitioners urge that the fine was levied under some sort of "inherent power" but the inherent powers of the inferior federal courts are drastically limited. Cf.

Frankfurter and Landis, 37 Harvard Law Review, 1010; "Contempt of Court", Sir John Fox, Chap. IX. In the United States the powers of an inferior federal court are confined to matters amounting to contempt as set out in 18 U. S. C. A. §§ 401 and 402, for in all other matters "the legislative authority of the Union must first make an act a crime, affix a penalty to it and declare the court that shall have jurisdiction of the offense". *Ex parte Grossman*, 267 U. S. 87 at 115. Petitioners argue an inherent power and urge that the court of appeals erred when it equated the fine to a criminal penalty, but "the sanction [of civil contempt] is aimed at a resisting will". Here there was no resisting will.

Petitioners urge that the fine should be supported because compensatory to the United States and because it was thought that a fine "would encourage compliance with the standing order in the future" [petition, 14]. The summary and comparatively unlimited power[5] compounds the danger to individual freedom which the mere existence of the power implies [Goldfarb, F. N. 5 at page 3].

The power to punish as for contempt "is, perhaps, nearest akin to despotic power of any power existing under our form of government", *State Ex Rel. Attorney General v. Circuit Court*, 97 Wisc. 1, 8; 72 N. W. 193, 194-5.

Even the power of Congress to punish for contempt is statutory [2 U. S. C. A. 192]. The element of wilfulness is required and the statute limits the punishment which may be inflicted. If the position of the petitioning judges be correct, the only limit upon the punishment which may be inflicted[6] is "abuse of discretion" of the court against which the offense, real or fancied, has been committed. There is no "crime" for which indictment or information is pro-

5. Goldfarb, "The History of the Contempt Power", 1961 Washington University Law Review, 1 at 2.

6. Reviewable only upon the ground that the court imposing sentence abused its discretion, *James v. United States*, 275 F. 2d 332 at 337. See also *Offutt v. United States*, 348 U. S. 11; further proceedings 232 F. 2d 69, and *Peckham v. United States*, 210 F. 2d 693.

vided; no right to jury trial; and no practical limit upon punishment. "Abuse of discretion" is not, we suggest a satisfactory test where Constitutional rights are involved.

The argument advanced in the dissenting opinion that the district court had the power to impose the fine because an attorney is under no obligation to seek admission to the bar of a particular court is, we suggest, answered by this Court's decision in *Cammer v. United States*, 350 U. S. 399, and *Ex Parte Garland*, 71 U. S. 333. See also *Schlesinger's Appeal*, 404 Pa. 584 at 596 and *In re Shorter*, Fed. Cas. 12,811. The right to practice law is Constitutionally protected as a property right and is not held "as a matter of grace and favor".

III. Nothing in Rule 83 Gives the District Courts Power to Promulgate Rules or "Standing Orders" to Deprive Attorneys of Property, in the Guise of Fines or Otherwise, Without Due Process of Law.

The practice in the district court under the so-called "standing orders" is in fact inconsistent with the Federal Rules of Civil Procedure and the fine levied cannot be sustained by reliance upon Rule 83. *Miner v. Atlass*, 363 U. S. 641.

The argument which petitioners make, that Rule 83 F. R. C. P. authorizes the promulgation of standing orders such as the one involved in the case at bar, will not stand analysis. The practice under the standing orders is not only inconsistent with the Federal Rules themselves, but would permit a sort of "local option" to exercise the legislative authority of the Union to make an act a crime, affix a penalty to it, and declare the court that shall have jurisdiction of the offense. *Ex Parte Grossman*, 267 U. S. 87 at 115. Rule 16 is self-executing and contains its own built-in limitations. It should not be permitted to become a vehicle for the revision of the old bill of particulars nor should it permit a "local option" which would make a pre-trial conference memorandum a sort of master pleading which

would supersede the complaint and answer. See article by James Fleming, Jr., 71 Harvard Law Review, 1473. See also the remarks of Judge Charles E. Clarke at the seminar on procedures, reported 29 F. R. D. 454.

The Federal Rules of Civil Procedure for the district courts are a comprehensive system with built-in sanctions and limitations. The system inaugurated in the court from which this proceeding arose has many provisions inconsistent with the Federal Rules. For example, compare the requirement concerning reports of medical examinations with Rule 35(b)(1); the limitation upon the time for discovery by deposition or interrogatories with Rules 26, 27, 30, 31, 33 and 34. Some requirements of the standing orders may even violate Constitutional rights. Cf. *Sibbach v. Wilson & Co.*, 312 U. S. 1.

In the case out of which this proceeding arose, the right of the parties under these rules were cut off a substantial time before trial. The rules, we suggest, do not grant rights to litigants and then permit the district courts to take them away or limit them under the authority of Rule 83. The system merely increases the already heavy expense of litigation by requiring parties to conduct extensive discovery early in every case, even where there is great likelihood that many cases will be settled. The heavy expense of extensive discovery should be reserved for those cases where, as the time for trial [not pretrial] approaches, it seems likely to the parties that actual trial will be necessary. Some discovery may be necessary in almost every case, but the expense of extensive discovery should not be required in every case prior to the early stage of the pretrial conference.

"Counsel's Contentions" [44a] are protected against discovery because the "Work Product"[7] of the attorney, but the petitioners argue that Rule 83 gives the district courts the power to change that, just as it makes the interrogatory and deposition practice unnecessary as a tool to

7. *Hickman v. Taylor*, 329 U. S. 495.

learn the identity of witnesses. Compare sub-section "C" of the standing order of October 23, 1958 [43a].[8]

Petitioners cite many rules from many district courts [Petition P. 12, F. N. 8] and the New Jersey Rule which served as a pattern [Petition P. 6, F. N. 2] for the standing order which was relied upon to impose the fine in this case, but they point to no other rule of any court [or "standing order" of any court] which provides for a fine assessed against an attorney. Lawyers respect courts or they would not practice law. Lawyers make mistakes, but unless there is an element of wilfulness, a fine as for criminal contempt is not the remedy. This Court "has never exercised the contempt power, and it has been as effective, powerful and dignified a Court as one could ever hope for".[9]

The idea that courts in metropolitan areas must have a power to fine to expedite litigation is to argue that need creates power, in spite of the carefully worded limitations in 18 U. S. C. A. § 401 and the proscription of the Fifth Amendment. Need "is in the eye of the beholder".[10]

CONCLUSION.

We would repeat here two things we made clear in the court of appeals. We have no criticism of the district judge who imposed the fine in this case. If the power to fine lawyers exists as believed by petitioners, it may not always rest in such capable hands as those of these petitioners.

The respondents, lawyers, do not desire to enter into litigation with the judges before whom they practice [40a].

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8. A provision almost identical with section "C" was one of the proposals considered by this Court's Advisory Committee and abandoned. See Preliminary Draft of Proposed Amendments prepared by the Advisory Committee, May, 1954.

9. Goldfarb, *supra*, at F. N. 5 1961, Washington University L. Q. at 15.

10. Compare the language of Mr. Justice Brandeis at page 479 of 277 U. S., dissenting in *Olmstead v. United States*, 277 U. S. 438.

Respondents respectfully suggest that denial of Certiorari will put an end to a situation where lawyers are trapped between the differing views of a majority of the judges of the district court and a majority of the judges of the court of appeals.

For the reasons stated elsewhere herein, Certiorari should be denied. If "a vigorous, independent bar"[11] is to be a part of the American judicial system, then a power in the courts to fine lawyers under circumstances such as the *facts* this case presents should not now be "discovered" for the first time under the claim of some "inherent power", or "some special relation of an attorney to the court". That was precisely the answer of Judge Peck.[12]

The petition should be denied.

Respectfully submitted,

T. E. Byrne, Jr.,
21 South 12th Street,
Philadelphia 7, Penna.,
Attorney for Respondents.

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11. *In re McConnell*, — U. S. —, 1962; 82 S. Ct. 1288 at 1292.

12. Stansbury, Report of the Trial of James H. Peck; Boston, 1833, Pages 11, 42 and 437.

Appendix.

RELEVANT DOCKET ENTRIES.

JOHN GAMBLE

v.

POPE & TALBOT, INC.

v.

JARKA CORP. OF PHILADELPHIA

1. April 24, 1958. Complaint filed.
   April 24, 1958. Summons exit.
   April 24, 1958. Plaintiff's demand for jury trial filed.
2. April 28, 1958. Appearance of Kruson, Evans & Shaw, Esqs. for defendant, filed.
3. May 9, 1958. Summons returned on 5/7/58 served and filed.
4. June 18, 1958. Answer filed.
5. June 18, 1958. Order to place case on the trial list, filed.
6. Septemebr 11, 1959. Motion for and Order of Court granting *leave to join Jarka Corp. of Phila. as* third-party defendant, filed. 9-14-58 noted and notice mailed—Kraft.
   Septemebr 11, 1959. Third-party complaint filed.
   September 11, 1959. Third-party summons exit.
7. September 22, 1959. Third-party summons returned "on 9-16-59 served" and filed.

8. October 6, 1959. Answer to third-party complaint, filed.

9. December 10, 1959. Plaintiff's pre-trial memorandum filed.

10. January 11,1960. Third-party defendant's pre-trial memorandum filed.

11. November 22, 1960. Defendant's pre-trial memorandum, filed.

November 22, 1960. Affidavit to be attached to defendant's answers to interrogatories, filed.

November 22, 1960. Deposition of William Jones, et al., filed.

November 22, 1960. Deposition of John Gamble, filed.

12. November 23, 1960. Pre-trial conference—VD

13. November 28, 1960. Pre-trial report, Van Dusen, J. filed.

14. December 9, 1960. Plaintiff's motion to strike defendant's pre-trial memorandum, filed.

15. February 20, 1961. Argued sur plaintiff's motion to strike pre-trial memorandum of defendant—CAV—VD.

16. February 23, 1961. Plaintiff's brief in support of motion to strike off defendant's pre-trial memorandum, filed.

February 23, 1961. Memorandum for defendant in opposition to plaintiff's motion to strike pre-trial memorandum, filed.

February 23, 1961. Memorandum sur-motion to strike pre-trial memorandum, filed—VD.

February 23, 1961. Order denying motion to strike pre-trial memorandum, in part, that counsel for defendant pay a fine of $100.00 to the United

States, and that plaintiff may within 30 days submit an order imposing upon defendant all costs, etc., filed 2/24/61 noted. Copies mailed 2/23/61—VD.

17. March 6, 1961. Notice of appeal (under criminal rule 37(a)(1)) by Timothy J. Mahoney, et al., from order of February 23, 1961, filed 3/7/61. Copy to Wilfred R. Lorry; W. E. Alessandroni*; Hon. Francis L. Van Dusen.

March 6, 1961. Copy of clerk's statement of docket entries to United States Court of Appeals, filed.

18. March 8, 1961. Jury called and sworn with alternates —VD.

19. March 16, 1961. Verdict in original action: the jury returns a special verdict and assess damages in favor of plaintiff in the sum of $38,559.80.

March 16, 1961. Special verdict filed.

20. March 17, 1961. Trial resumed (third-party action).

March 17, 1961. Special verdict in third-party action, filed.

March 17, 1961. Judgment in favor of plaintiff and against defendant.

49. July 10, 1961. Transcript of 2-20-61 sur motion to strike pre-trial memorandun filed.

50. Aug. 7, 1961. Partial transcript of testimony of Mar. 8 thru 17, 1961, filed. (2 vols.)

51. Sept. 12, 1961. Third-party defendant's motion to question the jurisdiction of the trial judge to hear motion for new trial, and alternative motions for judgment n.o.v., and/or to modify judgment, filed.

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* The United States Attorney for the Eastern District of Pennsylvania (24b).

Sept. 14, 1961. Argued sur third-party deft.'s motions for judgment, for new trial, to reduce amount of judgment, and to strike answers to interrogatories, and sur deft.'s motion for a new trial or for a remittitur—CAV.

52. Oct. 17, 1961. Certified copy of Order of U. S. Court of Appeals returning record so that Court may dispose of post trial motions notwithstanding appeal; record to be returned by 11/13/61, filed.

53. Oct. 23, 1961. Plaintiff's memorandum contra motions of defendant for a new trial, etc., filed.

54. Oct. 23, 1961. Defendant's memorandum in support of its motion for a new trial, etc., filed.

55. Oct. 31, 1961. Plff.'s memorandum in support of proposition that trial court did not lose jurisdiction to dispose of case on its merits because of notice of appeal from fine imposed as sanctions, filed.

56. Nov. 8, 1961. Memorandum and Order amending judgment entered 3/17/61 to read: "it is ORDERED that judgment of liability be and is hereby entered in favor of the Plaintiff, John Gamble, and against the Defendant, Pope & Talbot, Inc.," and granting a partial new trial on the issue of damages; and in all other respects, denying the deft.'s and third-party deft.'s post trial motions, filed. 11/13/61 noted and notice mailed—FVD.

57. Nov. 13, 1961. Memorandum of Settlement of the principal and third-party actions, filed.

Nov. 13, 1961. Record returned to U. S. Court of Appeals. #13578

58. Jan. 16, 1962. Transcript of hearing on 2/20/61, filed.

Jan. 26, 1962. Supplemental Record transmitted to U. S. Court of Appeals.

59. Feb. 8, 1962. Order to satisfy judgments, filed.

Feb. 8, 1962. In accordance with Order filed, the judgments in this case are marked "Satisfied."

Attest:

Deputy Clerk.

60. Aug. 6, 1963. Certified copy of order of U. S. Court of Appeals granting Clary, Ch. J., Kirkpatrick, J., Grim, J., J. W. Lord, Jr., J., Van Dusen, J., Kraft, J., Wood, J., Freedman, J., Luongo, J. and Body, J., leave to intervene as party appellees, received and filed.

McLaughlin

PRE-TRIAL REPORT.

Date Pre-Trial Held: 11/23/60.

No. on Consolidated List: 197

C. A. No. 24579

CASE TITLE: John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia.

1. TRIAL COUNSEL P—Wilfred R. Lorry, Esq. (C. Sovel also at pre-trial)

D—Timothy J. Mahoney, Esq.

TD—Joseph R. Thompson, Esq.

2. AMENDMENTS

3. DISCOVERY

4. P's CLAIM. 4" x 4" piece of lumber fell on 45-year-old P while working in hold discharging wood pulp due to unseaworthiness and failure to use reasonable care to supply safe place to work. Back, cervical, spine and head injuries. See P's pre-trial memo.

5. D's CLAIM No negligence or unseaworthiness and contributory negligence. Right of indemnity against Jarka for any liability of D. P had complete recovery in 6 months. D will argue to the jury that they should infer that the longshoreman wedged the 4" x 4" piece of lumber in the side of the space where the wood pulp was stored in an unworkmanlike fashion, resulting in its fall on P's head, in view of testimony.

6. STIPULATIONS that loose shoring timbers were stowed in a similar manner by the longshoreman on the opposite side of the ship prior to their commencing the unloading of the wood pulp on that side of the ship.

TD's CLAIM—No liability.

See pre-trial memo.

See D's pre-trial memo.

7. ISSUES

8. LEGAL ISSUES

9. TRIAL TIME 6 days

FRANCIS L. VAN DUSEN, *J.*

MEMORANDUM FOR SETTLEMENT ENVELOPE

RE: John Gamble v. Pope & Talbot, Inc. v. Jayka Corporation of Philadelphia—Civil Action No. 24579

P—$40,000.

D—$ 7,500.

TD—No figure.

Undersigned—$15,000 (75% to be paid by D and 25% by TD).

Counsel are to report on the status of settlement in the light of the above recommendation of $15,000 within two weeks.

FRANCIS L. VAN DUSEN, *J.*

November 23, 1960.

Letter (12/5/60)

Letterhead of

KRUSEN EVANS AND SHAW

December 5, 1960

John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia Civil Action No. 24579

Hon. Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Pa.

Dear Judge Van Dusen:

At the pre-trial conference in this case on November 23, 1960, after the facts were discussed, the Court made a settlement suggestion and, according to my recollection, asked counsel to convey it to their respective clients so as to be in a position to advise the Court within two weeks whether the terms were acceptable. Under the circumstances, the conference was adjourned and various issues raised by the pre-trial memoranda were not considered.

Plaintiff's attorney has, in the interval since the conference, told me that he has not advised his client of the Court proposed settlement figure and that he will not do so without first knowing that a firm offer in that amount is being made by the Defendants. Moreover, Plaintiff's attorney has said that even with a firm offer in hand he would not recommend the proposed settlement to his client.

I have reported the figure suggested by the Court to my client, but it is my client's practice not to consider authorizing settlement until a figure is known to be firm or has been made the basis of a mutual recommendation by counsel.

In the present posture of settlement negotiations, I cannot state whether or not a $15,000.00 settlement would

be acceptable to Pope & Talbot. I can only say that I would be willing to make a mutual recommendation at that figure.

I feel obligated to state that I am not satisfied with the contribution adjustment suggested by the Court and seriously doubt whether my client would approve of it. However, this would not necessarily stand in the way of settlement with Plaintiff, for Pope & Talbot might very well decide to make settlement with Plaintiff, should there be a mutual recommendation at $15,000.00, and press its cause of action for indemnity against the stevedore.

Unless the present stand-off can be resolved, I would like to request an appointment for a further conference to settle discovery issues raised in Defendant's memorandum.

Respectfully,

Timothy J. Mahoney

TJM jmn

cc: Wilfred R. Lorry, Esq.
Joseph R. Thompson, Esq.

10b *Letter (12/7/60)*

Letterhead of
JOSEPH R. THOMPSON

December 7, 1960

Timothy J. Mahoney, Esquire
Krusen, Evans & Shaw
21 South 12th Street
Philadelphia 7, Pa.

Re: John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia U. S. D. C. C. A. No. 24579

Dear Sir:

This will confirm that we will pay up to $3,750.00 to you in any settlement you reach with the plaintiff up to $15,000.00. This is in accord with the recommendation of Judge Van Dusen at the recent Pretrial Conference that we reimburse you 25% of a settlement up to $15,000.00. We understand you will further advise whether you will similarly agree to the recommended settlement.

In the event you reach a settlement to which we are not a party and pursue the action for indemnity, it is understood that we do not agree that the injuries allegedly sustained by Mr. Gamble on September 4, 1959 and June 25, 1960 arose out of or are in any manner related to the injuries alleged sustained on December 17, 1957. Our willingness to reimburse you 25% of a settlement you may reach with the plaintiff, is an effort to resolve the claim for indemnity by compromise of all of the issues. This will serve as notice that we shall not stipulate your liability to the plaintiff or to the reasonableness of any settlement which you may make with the plaintiff if the claim for indemnity is not settled at the same time.

Very truly yours,

Joseph R. Thompson

JRT:JM
cc—Hon. Francis L. Van Dusen
Wilfred R. Lorry, Esq.

Letterhead of
FREEDMAN, LANDY AND LORRY

December 7, 1960

Honorable Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Pa.

Dear Judge Van Dusen:

Your Honor asked that we advise you of developments following your suggestions, made at the Pre-trial Conference of the above-entitled matter on November 23, 1960. As I have pointed out, I would be happy to submit any firm offer made to our client. We have learned by reason of long and occasionally dramatic experience the undesirability of discussing in a vacuum the values and possibilities of settlement with our clients. This frequently serves to generate the kind of lay thinking which makes subsequent amicable disposition of a case impossible, sometimes creates suspicions which interfere with the proper attorney-client relationship, and never serves any good purpose in development of that particular piece of litigation. Accordingly, we do not discuss figures with clients until we have a firm offer. The procedures I have set forth above were again explained to Mr. Mahoney quite recently in great detail as has been done on numerous previous occasions.

We regret that Your Honor's efforts to be of assistance in supplying dispassionate and objective thinking seem to have been unavailing in this situation. Nevertheless, we do deeply appreciate that such aid was offered and want you to know that full serious consideration was and always will be given to your suggestions.

Respectfully yours,

W. R. Lorry

WRL: olm
cc: Timothy J. Mahoney, Esq.
Joseph R. Thompson, Esq.

Letter (12/8/60)

Letterhead of
KRUSEN EVANS AND SHAW

December 8, 1960

John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation
of Philadelphia Civil Action No. 24579

Hon. Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Pa.

Dear Judge Van Dusen:

I have read Mr. Lorry's letter of December 7, 1960, with deep interest.

It would certainly seem that if his remarks supporting his position have any meaning and validity, they should apply in favor of Defendants as well as Plaintiffs. Then we might expect that no litigation would ever be settled, at least unless the parties were able to rid themselves of their counsel.

Hence, I still think there is something to be said in favor of a mutual recommendation by counsel and I would like to hear from Mr. Lorry as to whether he will agree, along with me, to recommend settlement for $15,000.00.

Respectfully,

Timothy J. Mahoney

TJM/jmn

cc Wilfred R. Lorry, Esquire
Joseph R. Thompson, Esquire

Letter (12/8/60) 13b

Letterhead of
KRUSEN EVANS AND SHAW

December 8, 1960

John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia Civil Action 24579

Joseph R. Thompson, Esquire
Public Ledger Building
Philadelphia 6, Pa.

Dear Mr. Thompson:

I have your letter of December 7, 1960.

Since our negotiations are being carried on in a fish-bowl and your letter has not made the glass altogether clear, would you kindly advise whether, under the terms of the settlement to which your client would agree, it would be expected that Plaintiff would reimburse Jarka's compensation carrier for its compensation liens resulting from the claimant's subsequent accidents of September 7, 1959 and June 25, 1960.

Very truly yours,

KRUSEN, EVANS & SHAW

By T. J. Mahoney

TJM jmn

cc/ Hon. Francis L. Van Dusen
Wilfred R. Lorry, Esquire

Letter (12/8/60)

Letterhead of
UNITED STATES DISTRICT COURT

December 8, 1960

Re: Gamble v. Pope & Talbot, Inc. v. Jarka Corp. Civil Action No. 24579

Wilfred R. Lorry, Esq.,
1415 Walnut Street,
Philadelphia 2, Pa.

Dear Mr. Lorry:

In view of Mr. Mahoney's letter of December 5, indicating that he is willing to recommend the $15,000. suggested by me as a settlement figure, I request that you advise your client that I have recommended that the case be settled at this figure. Even though you feel that you cannot recommend his settling on this basis, you can advise him of my recommendation, telling him that he ought to seriously consider it, together with the serious consideration he should also give to your view on the subject. I am glad to discuss this settlement after you have notified me of your client's reaction, but see no particular point in having another conference until you have obtained the view of your client on my recommended figure.

With reference to your letter of December 7, please note that I am not suggesting that you discuss values and possibilities in a vacuum but a concrete figure. You must, of course, advise your client that the defendant has not definitely offered this figure but that I have asked the defendant's counsel, as well as you, to find out if your clients would accept my recommendation. Unless the judge can receive a direct answer from each party without all the delays incident to requiring one to decide first and then determining which one should make the first decision, I am sure that we are going to continue to have the low ratio of settlements which presently prevail. No one has ever given me a good reason why each counsel cannot submit the

judge's figure to his client and report on whether this figure is acceptable. As you will note from the memorandum below, I am asking Mr. Mahoney to do the same thing that I am asking you to do in this letter.

Very truly yours,

Francis L. Van Dusen
Judge

FVD:b.
cc: Timothy J. Mahoney, Esq.
Joseph R. Thompson, Esq.

MEMORANDUM TO MR. MAHONEY:

Now that Mr. Thompson has agreed to my recommendation, I want you to submit it to your client and request an answer as to whether or not it will settle on the basis of my recommendation, even though you apparently are not satisfied with the contribution adjustment. You have never given me a good reason why you should not submit my recommendation to your client, irrespective of whether or not plaintiff's counsel agrees with it. I shall expect an answer from both counsel for plaintiff and counsel for defendant as promptly as possible, in view of the fact that the two-week period mentioned in my memorandum of November 23 has now expired.

As to paragraphs 4 and 5 under D (next-to-last page of your pre-trial memo), I am sure plaintiff's counsel will comply. If not, you will have to file discovery motions in the usual way. The matters in paragraphs 3 and 6 may require motions, which should be filed promptly. When filing any discovery motion, please tell the Clerk to assign it to me since the pre-trial conference has been held. Also, you should notify Miss Lewis of the title of the motion, as well as time of filing. Pre-trial conferences are not the time for arguing discovery matters.

Francis L. Van Dusen

Letterhead of
FREEDMAN, LANDY AND LORRY

December 8, 1960

Messrs. Krusen, Evans and Shaw
21 South 12th Street
Philadelphia, Penna.

Attention: Timothy J. Mahoney, Esquire

Re: John Gamble v. S. S. "P. & T. Voyager"

Dear Mr. Mahoney:

We enclose herewith a true and correct copy of plaintiff's motion to strike defendant's pre-trial memorandum, the original of which has been filed of record.

Very truly yours,

FREEDMAN, LANDY AND LORRY

By Charles Sovel

CS:mk
Encl.
cc/ Joseph R. Thompson, Esquire

Letterhead of:
KRUSEN EVANS AND SHAW

December 9, 1960

John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia Civil Action No. 24579

Hon. Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Pa.

Dear Judge Van Dusen:

I received a copy of your letter of December 8, 1960.

I do not want Your Honor to think that I did not submit your settlement recommendation to my client. It was submitted in a report written very shortly after the pre-trial conference. In the third paragraph of my letter of December 5, 1960, written to Your Honor, I specifically stated "I have reported the figure suggested by the Court to my client, . . ."

I have never attempted to maintain that a settlement recommendation made by the Court should not immediately be submitted to the parties. On the contrary, I think that there is an absolute obligation on the part of counsel to submit such a recommendation as promptly as possible.

Respectfully,
Timothy J. Mahoney

TJM/jmn
cc: Wilfred R. Larry, Esq.
Joseph R. Thompson, Esq.

Letterhead of
FREEDMAN, LANDY AND LORRY

December 27, 1960

Honorable Francis L. Van Dusen
Judge, U. S. District Court
2110 U. S. Court House
Philadelphia 7, Pa.

Re: John Gamble v. Pope & Talbot

Dear Judge Van Dusen:

I regret that the demands of the holidays have made it impossible for me to report earlier on the results of the conference with our client. Despite my reluctance to do so, I did discuss the results of our pre-trial conference with Mr. Gamble, relating to him in detail the views of Your Honor regarding the settlement value of the case and pointed out to him that you had urged that serious consideration be given to your suggestion in the hope that an amicable disposition could be arrived at without further delay. I had previously pointed out to you why we had adopted the policy which we have followed for many years in refraining from discussing evaluations and settlement possibilities with clients until a firm offer had been made. The reaction of Mr. Gamble served only to reinforce our feelings in this regard. He did, at my earnest urging refrain from giving me any summary response until he had discussed the matter with his wife and two days thereafter he told me that she agreed with him completely that the figure was entirely unacceptable as being grossly inadequate when compared with the damage he has already sustained and the distressing outlook for the future. I hope that I was able to overcome our client's feelings which were tinged with both resentment and suspicion, with some indi-

cation that perhaps his counsel were selecting the easiest way out because the alternative involved some strenuous effort on our part.

I regret that we are compelled to report an unfavorable reaction to the proposal made. However, our further examination of the situation supports our earlier belief that Mr. Gamble is entirely correct in rejecting this figure because of its inadequacy. I reiterate our deep appreciation for your earnest efforts in seeking to aid counsel to arrive at a mutually satisfactory disposition of this case.

May I also take this opportunity to join with my office in extending our unanimous and heartfelt wishes for good health and good fortune to you and your family now and throughout the new year.

Sincerely yours,

W. R. Lorry

WRL:olm
cc: Joseph R. Thompson, Esq.
Timothy J. Mahoney, Esq.

Letter (12/28/60)

Letterhead of
KRUSEN EVANS AND SHAW

December 28, 1960

John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation of Philadelphia, Civil Action No. 24579

Hon. Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Pa.

Dear Judge Van Dusen:

Plaintiff's attorney has made it abundantly clear that he submitted the Court's suggested settlement figure either without recommending it or, at the same time, recommending against it. Quite naturally, his client rejected it. Whether Plaintiff or Defendant, it is quite rare for a claimant-litigant to accept terms that do not have the positive recommendation of counsel engaged for the purpose of advising him.

In reporting to Pope and Talbot, I found it necessary to relate that Plaintiff's attorney had, subsequent to the pre-trial conference, indicated that he would not recommend the Court's settlement figure. Accordingly, since the figure was not being mutually recommended by counsel, Pope & Talbot did not submit the settlement proposal to its committee designated to review settlements. Unfortunately, this deprives me of an opportunity to describe its emotional impact on the committee.

I do not quarrel with my opponent's refusal to recommend a specific figure in settlement. That is his prerogative. I simply cannot understand why he surrounds his position with a screen of verbiage regarding the fact that he did not have a firm (in the sense that settlement authority had been given) offer. There appears to be no question

that the firmness or infirmity of the figure played no part in Mr. Lorry's decision to reject it.

Furthermore, if Freedman, Landy & Lorry has followed a policy for many years of refraining from discussing evaluations and settlement possibilities with clients until a firm offer has been made, I blush to think of the great number of settlements that have inadvertently been presented to the interests which we represent as being mutually agreeable to counsel when, in point of fact, our customary adversaries were apparently awaiting our firm commitment before deciding whether to make a positive recommendation to their clients. I marvel that the backfires from such misbegotten machinery could remain muffled for so long a period of time.

Thank you for attempting to help us in reaching some settlement understanding.

Respectfully,

Timothy J. Mahoney

TJM/jmn

cc: Wilfred R. Lorry, Esq.
Joseph R. Thompson, Esq.

Letterhead of
UNITED STATES DISTRICT COURT

December 28, 1960

Re: John Gamble v. Pope & Talbot, Inc. v. Jarka Corporation—Civil Action No. 24579.

Wilfred R. Lorry, Esq.
1415 Walnut Street
Philadelphia 2, Pa.

Dear Mr. Lorry:

Thank you very much for your letter of December 27.

In view of your client's apparent feeling of resentment and suspicion, I am writing this letter to emphasize that the suggestion that the case be settled for $15,000. was my suggestion with which you d d not agree. I am enclosing a copy of this letter so that you may forward it to your client, and I will emphasize here that I feel that, on the basis of my experience, there is a strong probability that the client will recover nothing or a very small amount. He will have only himself to thank for his feeling that the figure suggested by me is unreasonable.

As to future figures recommended by me, I am always glad to have counsel bring their clients in so I can explain my recommended figures to them in person in order to relieve the attorney of any feeling by the client that he is responsible for the figure which I suggest. After all, I am in a position to be detached and objective, whereas an attorney looks at the matter from the point of view of his client and, hence, could hardly be in a position to suggest as fair a figure as the judge can.

In view of the position taken by your client, it seems clear that the case will have to go to trial and he will have to take his chances, which may involve his securing nothing.

Sincerely yours,

Francis L. Van Dusen
Judge

FVD:bl

cc: T. J. Mahoney, Esq.
Joseph R. Thompson, Esq.